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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
GTE Corporation,	)	CC Docket No. 98-184
Transferor	)	
	)	
and	)	
	)	
Bell Atlantic Corporation,	)	
Transferee	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF CTC COMMUNICATIONS CORP.

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SUMMARY

The proposed merger of two of the largest incumbent local exchange companies in the country presents to the Commission one of the most important questions it has faced since passage of the 1996 amendments to the Communications Act of 1934. Those amendments, particularly those which appear in 47 U.S.C. §§ 251-252 and 271, reflect the most fundamental revision of the Communications Act since its passage in 1934. Those revisions establish a regime in which, to encourage the development of competition in the telecommunications industry, incumbent local exchange companies are mandated to provide facilities and services to competitive entrants. The two proponents of the present merger are, individually, massive entities with revenues in the tens of billions of dollars annually. They contend that their merger will permit them to better compete with some of the nation's largest communications entities. Neither company can conceivably need further assets, expertise, or customer base to compete successfully with their peers in the telecommunications universe. Yet they claim to need to double in size to be strong competitors. A more far-fetched claim, with less merit, is difficult to comprehend. Even if it were true that GTE and Bell Atlantic are not, individually, large enough to compete effectively, approving a merger on this basis ignores the interests of Bell Atlantic's medium and small customer base and of the CLECs seeking to serve such users.

Before approving the merger of two already enormous entities, the Commission must consider carefully that neither company has in good faith fulfilled the statutory obligations set forth in the law. Moreover, while neither entity has faithfully fulfilled its statutory obligations one of them, GTE, has amassed a record so starkly dismissive of its legal obligations, so dramatically deficient with respect to its implementation of the law, that the only explanation can

be an internal policy of conscious and calculated resistance to fulfilling its lawful obligations. To permit such an entity to double its resources and presence, especially in many of the premier telecommunications markets in the U.S., would be to reward the most callous and willful disregard of law which has been brought before this Commission in many years.

Commenter, CTC, is a CLEC offering resale service in New York and in all seven New England states. In this region CTC has developed a business largely by assuming existing contracts between Bell Atlantic and high volume end users of Bell Atlantic services. Until January of this year, CTC was gradually building its customer base by servicing these former Bell Atlantic customers with the cooperation of Bell Atlantic. In January, however, Bell Atlantic suddenly altered its policy in a number of respects so as to chill the market for CTC's services. Believing that Bell Atlantic's change of policy was in violation of federal and state law, CTC filed an antitrust suit against Bell Atlantic and initiated formal complaints in a number of state commissions. New York, Massachusetts, and New Hampshire have already ruled in CTC's favor. No state commission has ruled against CTC. Nevertheless, with the fine arrogance that an overwhelming market position can provide, Bell Atlantic has simply declined to abide by the various state commission rulings, eroding CTC's business and putting it to the burden of further litigating its rights under the 1996 Act.

This situation is bad enough as it is. To approve the merger of Bell Atlantic and GTE, however, could only make matters worse by enhancing the market power, financial, operational, and political resources of the incumbent carriers. In a merger application the burden of proof is on the applicants. The material provided in the merger applications falls far short of a persuasive showing that the public interest would be served by grant of the application. The Commission should reject the application on the basis of the present record, or hold evidentiary hearings in which the details of Bell Atlantic's and GTE's prior behavior can be fully explored.

If the Commission determines nevertheless to grant the merger, CTC suggests that it impose a series of premerger conditions directed to the merged entity's obligations and conduct with respect to the pro-competitive provisions of Title II of the Act. Short of rejecting the application, such conditions are the only way to assure that the merger does not further erode Congressional policy as set forth in the 1996 Act.

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COMMENTS OF CTC COMMUNICATIONS CORP.

CTC Communications Corp ("CTC"), by the undersigned counsel, and pursuant to the Commission's Public Notice released October 8, 1998, files these comments on the above-captioned application for authority to merge GTE Corporation into Bell Atlantic Corporation ("Merger Application") under various provisions of the Communications Act of 1934, as amended. CTC opposes grant of the Merger Application on the grounds that it is anti-competitive and contrary to the public interest. The merger of two already-dominant incumbent local exchange carriers ("ILECs") will only further delay implementation of the market-opening provisions of the Telecommunications Act of 1996.[1] No showing has been made that the proposed merger would serve the public interest. If the Commission nevertheless determines to grant the Merger Application it should impose specific pre-merger pro-competitive conditions.

[1] Public Law 104-104, amending the Communications Act of 1934, codified at 47 U.S.C. § 151 *et seq*. (the "1996 Act").

While such conditions will not make the proposed merger desirable, they will at least limit the damage that would otherwise be done to the competitive marketplace.

I. INTRODUCTION

CTC is certificated as a CLEC in New York state and in the New England states where it resells Bell Atlantic services. CTC, therefore, would be directly affected by the merger and is a party in interest with respect to the merger.

Notwithstanding the Applicants' claims to the contrary, the proposed merger is not in the public interest because neither GTE nor Bell Atlantic has demonstrated a full commitment to the market opening measures set forth in applicable law. On the contrary, both have consistently abused their historical monopoly status and continue to do so.[2] The public would be significantly disadvantaged by the horizontal merger of two already dominant telephone entities. More specifically, because GTE has been even less forthcoming with respect to its obligations under the 1996 Act than has Bell Atlantic, the merger of the two would, in all likelihood, degrade implementation of the pro-competitive provisions of the 1996 Act throughout Bell Atlantic's existing service area, an area which encompasses most of the major population centers on the East Coast and many of the country's most important commercial centers.

GTE has demonstrated in numerous states where it currently operates as an ILEC a uniquely and dramatically hostile attitude towards market competition as mandated by law.

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[2] Indeed, it would appear that GTE itself has experienced some anticompetitive activities on the part of its prospective parent. In *GTE New Media Services, Inc.* v. *Ameritech Corporation et al.*, ___F.Supp. 2d___(D.D.C. No. 97-CV-2314 (RMU) (1998 WL68294), GTE has accused Bell Atlantic, among other RBOCs, of engaging in a conspiracy to monopolize the Internet Yellow Pages market.

Allowing it to import that corporate approach into Bell Atlantic's service area can only harm the public living and working within those areas. Either company alone already possesses a telecommunications market share of such magnitude that it can with impunity delay and defer the implementation of key objectives of the1996 Act, particularly §§ 251 to 254 and 271. Granting authority for the merger can only further delay implementation of the law, both because the added scale of the enterprise would enhance its ability to forestall competition and because one of the entities involved in the merger, GTE, has demonstrated such bad faith that intermixing that mind set with Bell Atlantic will further delay implementation of the Congressional objective set forth in the 1996 Act.

Nationwide, Bell Atlantic already controls over 41 million access lines.[3] It currently serves the headquarters of 175 of the Fortune 500 companies.[4] GTE currently serves some 22 million access lines. After merging, the combined company will have 63 million access lines[5]. As a result, if the merger is approved, Bell Atlantic, which already serves the vast majority of the access lines in its current service area, would be able to call on even greater assets than it now has to impede the development of competition. GTE provides some local exchange service in states currently served by Bell Atlantic and is authorized to provide interlata service as well.

Notwithstanding the applicants' claims and abundant corporate statements to the contrary, they are only reluctantly cooperating with CLECs. Specifically, CTC, which offers

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[3] Bell Atlantic Media Fact Sheet, http://www.ba.com/kit/ (visited Nov. 9, 1998)

[4] "Bell Atlantic and GTE Agree to Merge," Press Release July 28, 1998, http://www.ba.com/nr/1998/Jul/19980728001.html

[5] "Bell Atlantic and GTE Agree to Merge," Press Release July 28, 1998.

service primarily as a reseller, has encountered countless delays, difficulties and resistance in seeking to implement its resale strategy with Bell Atlantic. Given GTE's astonishing record of non-implementation of the 1996 Act within its ILEC service areas, it is simply unimaginable that the merged entity can be expected to cooperate in the implementation of pro-competitive policies.

In light of the size and importance of the proposed merger it is important to review briefly the context in which the Commission must consider the issues. Less than 18 months ago this Commission approved the merger of Bell Atlantic and NYNEX. *Applications of NYNEX Corp. and Bell Atlantic Corp.* ("*Bell Atlantic*"), 12 FCC Rcd 19985 (1997). There the Commission addressed at length the applicable legal standards for consideration of telephone company mergers:

> In fulfilling the statutory obligation to serve the public interest, the Commission examines whether a proposed license transfer is consistent with the policies of the Communications Act, including, among other things, the transfer's effect on Commission policies encouraging competition and the benefits that would flow from the transfer. Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by the antitrust laws. The public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws. Under the public interest standard, the burden of proof is on the applicant, not the Commission. In addition, under the public interest standard, the Commission may consider the trends within and needs of the industry, the factors that influence Congress to enact specific provisions for a particular industry, and the complexity and rapidity of change in the industry.

Bell Atlantic, id. at 20003-20004 (footnotes omitted). The Commission went on to note that it also has concurrent jurisdiction to review mergers under sections 7 and 11 of the Clayton Act, but declined to exercise such jurisdiction because it concluded that its jurisdiction under the Communications Act was sufficient to address and resolve the issues presented by the merger.

See id. at 20005. However, the Commission noted that it "would not hesitate to exercise [its] Clayton Act authority, issue a complaint and initiate a hearing in the appropriate case." *Id.*

In rejecting the arguments of Bell Atlantic and NYNEX that the Commission lacked jurisdiction to consider the impact of their proposed merger on local competition, the Commission observed that the public interest analysis which it is bound to undertake "necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions." *Id.*, at 20007. (footnotes omitted). The Commission referred specifically to the new provisions in Title II of the Act, including those requiring incumbent local exchange carriers to offer competitors interconnection, to lease unbundled UNEs at reasonable and nondiscriminatory prices, to offer retail services at wholesale rates, and provide reciprocal compensation, provide collocation, and implement number portability and dialing parity. *See generally id.* at 20009-10. "In addition, we also consider the effect of the merger on the Commission's ability to constrain market power as competition develops, but before competition is itself sufficient to constrain market power." *Id.*, at 20009 (footnote omitted). The Commission also observed that "It is, however, precisely because such competition is just beginning at this time and uncertainties exist that care in evaluating the potential impact of mergers in evolving markets is crucial to ensuring the development of pro-competitive, deregulatory national telecommunications industry structure." *Id.* at 200012.

These are the criteria this Commission applied to the Bell Atlantic/NYNEX merger only last year, and there is no less justification to apply these same criteria to the present merger. In this connection it is noteworthy that after conducting a thorough analysis of the various pro-competitive obligations on incumbent LECs set forth in Title II of the Act, the Commission concluded that the proposed merger was a "close case" but could be approved with the imposition of detailed conditions and reporting requirements. A year and a half later, these considerations remain not only as relevant as before, but as crucial since progress in the development of competition both in GTE's and in Bell Atlantic/NYNEX's operating territories has been modest, at best. Indeed, in the case of GTE, as set forth in further detail herein, the progress has been so minuscule that serious questions about GTE's good faith are presented -- questions which can only be resolved on the basis of a full trial-type record in which GTE's bland assurances can be tested by discovery and informed cross examination. Given the *prima facie* showing herein that neither applicant has abided by its obligations in good faith, the Commission should inform itself, through the development of a full record, whether the proposed merger will, in the words of the Clayton Act, "substantially... lessen competition, or to tend to create a monopoly"[6] in the provision of local exchange services. Indeed, it is just this sort of predictive judgment for which the Commission was created. *See, e.g., FCC v. RCA Communications, Inc.*, 346 US 86, 96-97 (1953); *Bell Atlantic*, 12 FCC Rcd 19985 at 20011, 20041 and n. 99 (1997).

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[6] 15 U.S.C. §§ 18; 21(a).

II. THE MERGER WILL INCREASE THE INCENTIVE OF THE MERGED COMPANY TO RESIST MARKET-OPENING MEASURES.

The danger of reducing incentives to cooperate with market-opening measures is particularly acute in this merger. Bell Atlantic, as a former RBOC, must receive § 271 approval for entry into the long-distance market in all the states it currently serves, and is currently seeking such approval before the New York Public Service Commission. Presumably it will seek such authority in other states if its application in New York State is approved and thereafter from the FCC. Thus Bell Atlantic has at least some incentive to agree to market-opening measures. By contrast, GTE is already in the long-distance market. As a consequence, GTE has taken an extremely recalcitrant attitude toward competition. Its "scorched-earth tactics" have been totally successful in keeping significant competition out of its service areas. But after the merger, the merged company will have to consider whether the possible benefits from agreement to market-opening measures might be offset by the adverse precedent set in terms of opening up markets in GTE service areas. With control of over one-third of the nation's access lines at stake, the merged company may well conclude that the benefits of cooperation in terms of § 271 approval are not worth the cost in terms of losing its control over access lines.

Bell Atlantic and GTE argue that the merger will not adversely affect competition, because they do not presently compete against each other. However, under section 7 of the Clayton Act, which the Commission must consider in reviewing proposed mergers, the Commission is required to consider "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." United States v. Philadelphia National Bank, 374 U.S. 321, 362 (1963). The impact of the merger on future competition is a particularly important consideration in the dynamic and changing telecommunications market. There are at least two respects in which the extreme concentration that these mergers will bring about can be expected to have a severe adverse impact on the future of competition in the local exchange market.

A. The Merger Will Increase the Incentive of the Merged Company to Resist Market-opening Measures.

In *Bell Atlantic*, the Commission recognized that a merger between two large LECs may have an effect on the parties' willingness to cooperate with market-opening measures. That is because "[o]n any particular issue . . ., one incumbent LEC may have an incentive to cooperate with its competitors, contrary to the interests of the other LECs."[7] But the precedent set on that issue "will reduce the others' ability to refuse to cooperate the same way." *Id.* "If two major incumbent LECs merge, however, this incentive may be reduced. To the post-merger incumbent LEC, cooperation in one area may have untoward consequences in another and cooperation may be against the firm's overall interests." Id. As the Commission noted, "[t]his may result in the post-merger incumbent LEC cooperating less than the pre-merger incumbent LECs would have in enabling competition to grow."[8] The Commission found that that factor was not sufficient to require disapproval of the Bell Atlantic-NYNEX merger, although it considered the issue close and observed that further reductions in the number of Bell companies or comparable incumbent LECs would present serious public interest concerns.[9]

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[7] *Bell Atlantic*, 12 FCC Rcd 19985 (1997), ¶ 154.

[8] *Id.*, footnote omitted.

[9] *Id.* at ¶ 156.

B. The Merged Company Is Not Likely To Make the Local Exchange Market More Competitive.

Bell Atlantic and GTE argue that the merger will benefit local competition, because the merged company will undertake an ambitious campaign to provide facilities-based local competition against other ILECs. They argue that neither merger partner alone could undertake such a campaign, but the merged company can and will.

The argument is not credible. GTE is already a huge company, fully capable of an out-of-region competitive campaign. Its 1997 revenues were $23.2 billion and net income $2.7 billion[10]. Bell Atlantic is also huge, with 1997 revenues of $30.2 billion and net income of $2.4 billion[11]. GTE and Bell Atlantic name AT&T, MCI WorldCom and Sprint as their principal competitors. Of these three, the 1997 figures show that GTE and Bell Atlantic are both larger than Sprint ($14 billion revenue, $952 million net income[12]), comparable to MCI WorldCom ($27 billion revenue, $592 million net income[13]), and smaller than AT&T ($51 billion revenue, $4.3 billion net income[14]). In terms of both revenues and net income, GTE and Bell Atlantic individually dwarf even the largest companies in the next tier of CLEC competitors[15]. They can

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[10] GTE Corporation, 1997 Annual Report

[11] Bell Atlantic, Investor Information, http://www.bell-atl.com/invest/financial/statements/income annual.htm (visited November 10, 1998)

[12] Sprint 1997 Annual Report

[13] WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

[14] AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii

[15] A recent Merrill Lynch report estimated that as of the end of the first quarter of 1998, the CLECs collectively had a 3.5% share of the $101 billion annual local market revenues –

hardly argue that they need to merge because one of their competitors (AT&T) is larger than they are. Under that rationale, mergers would always be allowable until only two companies were left in each market. And in any event, AT&T's larger size has not yet resulted in significant success in the local exchange market.

Moreover, the very substantial investments in foreign countries that GTE and Bell Atlantic have made abroad belie the assertion that they are incapable -- without this merger -- of doing business outside of their own regions. GTE's international operations "stretch from British Columbia and Quebec in the north, to the Dominican Republic, Puerto Rico and Venezuela to the south." Public Interest Statement at 14 n.10. Bell Atlantic has wireless investments in Mexico, Italy, Greece, Slovakia and the Czech Republic, and wireline investments in the UK, Thailand, Indonesia and the Philippines." *Id.* The applicants have not explained why, if they can enter new markets abroad without merging, they cannot also do so in this country.

The applicants admit that GTE is already well-positioned to provide facilities-based competition in many cities where its network comes close to the city and/or it is already providing service in an adjacent area. Public Interest Statement at 1-2, 6-7. But, they contend, GTE lacks the relationship to major corporate customers that Bell Atlantic already has. GTE does not want to compete until it can obtain the advantage of "anchor customers" through a Bell Atlantic connection. Kissell Aff't., ¶ 7.

But several of the CLECs competing for large corporate customers do not have the advantage of existing "anchor customers." And yet the Commission has recognized that CLEC

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amounting to approximately $ 3.85 billion. Merrill Lynch, "Telecom Services – Local, CLECs: What's Really Going On" (June 19, 1998), at pp. 5, 9.

competition for large corporate customers is beginning to become significant[16]. Moreover, the "anchor customers" that MCI WorldCom and Sprint have were originally acquired the old fashioned way – by competing for them in the open market. There is no reason why GTE and Bell Atlantic cannot seek "anchor customers" in the same way. Basically, the "anchor customer" argument is a proposal by Bell Atlantic to use the customer relationships it obtained as a local exchange monopolist within its present region to leverage its way into out-of-region markets. Under this proposal, the merged company would be "employing [its] monopoly power as a trade weapon against [its] competitors." United States v. Griffith, 334 U.S. 100, 107 (1948). That does not represent a benefit of the proposed merger; instead, it is another anticompetitive effect.

GTE has ample resources to support an aggressive marketing campaign. It is already in several suburban markets adjacent to prime urban markets now controlled by RBOCs. It is already in a position to offer corporate customers long-distance and advanced data-transmission services. It should not need existing "anchor customer" relationships to mount a credible marketing campaign for out-of-region corporate customers, and to use that campaign as a platform for reaching smaller businesses and residential customers. The fact that it has not done so probably reflects the fact that the merger route is cheaper and less risky than competitive marketing, and thus will be pursued unless and until the Commission makes it clear that the merger wave in this industry has gone far enough.

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16 MCI/WorldCom Merger Order, ¶¶ 172-182.

III. NEITHER PETITIONER HAS IMPLEMENTED IN GOOD FAITH ITS MARKET OPENING OBLIGATIONS.

A. Bell Atlantic

The delays and other difficulties which CTC has experienced in its dealings with Bell Atlantic and continues to experience are currently before a number of fora. CTC has filed complaints against Bell Atlantic in New York and in five of the six New England state commissions[17]. As seen from CTC's perspective, Bell Atlantic is engaged in a widespread, deliberate and calculated campaign to deter the resale of its services by CLECs such as CTC, in violation of § 251 of the 1996 Act. Indeed only two months ago the New York State Public Service Commission ruled that Bell Atlantic was obligated to permit CTC to acquire by assignment existing customer service agreements between Bell Atlantic and end users, and to do so without the imposition by Bell Atlantic of a "termination" fee upon assignment of the contract[18]. Bell Atlantic has not yet implemented that order. Corporate speeches exhorting CLECs to compete in the field[19] are thus nothing but misleading rhetoric. The fact is that where CTC tries to work cooperatively, it is generally subjected to slow-roll tactics of one kind or another. It is instructive to note that Bell Atlantic's resale tactics have been condemned not only

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[17] Complaints are pending in New York, Massachusetts, Rhode Island, Vermont, New Hampshire and Maine.

[18] *See In the Matter of Complaint and Request of CTC Communications Corp, New York Public Service Commission*, Case No. 98-0426, Order *rel.* September 14, 1998.

[19] *See e.g.*, statement of Daniel Whelan available at http://www.ba.com/nr/1998/Sep/119980903003.html. ("Let's move the game out of the hearing room and on to the field of competition.")

in New York but also in other jurisdictions[20]. A suit filed by CTC alleging anti-trust violations by Bell Atlantic in the provision of resale services is also pending[21]. An entity of Bell Atlantic's size and sophistication can be expected to be, and Bell Atlantic is, adept at reciting the pro-competitive mantras which it knows regulators want to hear. Similarly, Bell Atlantic can produce data showing that, in the aggregate, it has provided many agreements pursuant to the 1996 Act. Unfortunately, as set forth below, the reality for CTC is quite different and this Commission must give careful consideration not to Bell Atlantic's polished pro-competitive prose, but to the reality of its day-to-day conduct which an objective analysis will show is calculated, as a matter of corporate policy, to inhibit the development of CLEC resale competition.

A large portion of CTC's activity is based on the assumption of existing contracts between Bell Atlantic and end-users who had contracted with Bell Atlantic for long term service at favorable rates. The customer service arrangements ("CSAs") often included a termination liability if a customer terminates the contract before the end of the contract period. The assumption of these CSA's has allowed resellers to fill a market need by providing better, more responsive service to customers. Resellers make separate monthly payments that support Bell Atlantic's wholesale operations systems and access to those systems. The other costs (i.e.

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[20] *In the Matter of CTC Communications Corp*, Mass. DTE, Docket No. 98-18, Order dated July 2, 1998; *In the Matter of CTC Communications Corporation, Petition for Enforcement of Resale Agreement,* New Hampshire Public Utilities Commission, Case No. 98-061, Order No. 23, 040, rel. October 7, 1998. The Mass DTE decision is subject to a pending request for reconsideration.

[21] *CTC Communications Corp. v. Bell Atlantic Corporation* (D. Me., Case No. 97-395-P-H).

individual customer billing and service) that Bell Atlantic avoids when resellers perform those tasks are reflected in the wholesale discount.[22]

When the contract is assigned to CTC, it assumes all the contractual obligations of the customer and agrees to pay Bell Atlantic the same retail rates which Bell Atlantic had been charging the customer. CTC then undertakes to service such account and remit payment directly to Bell Atlantic. Under this arrangement, a customer would execute a contract and a letter of authorization with CTC. At CTC's request, Bell Atlantic would convert its records to reflect that CTC, not the end user, was the customer of record. All other terms between Bell Atlantic and the customer would remain the same, i.e., term length, volume commitments, termination provisions, and retail prices which CTC would pay to Bell Atlantic on the end user's behalf. Neither the terms of the typical end user contract with Bell Atlantic nor the incorporated tariffs prohibit any contract assignments. Although, as noted, the original CSA's provided for a penalty for early termination of the contract, until January 21, 1998 Bell Atlantic had not been following the practice of imposing such penalties upon assignment of the CSA from the end user to CTC.

Beginning in January, 1998, Bell Atlantic refused to process customer orders as it had done previously, and directly billed the assignor-end user the termination fee when contracts were assigned. This change in treatment of contract assignments had the fully predictable effect of bringing such assignments to a halt. CTC thereupon filed complaints with state regulatory

[22] In order to provide telecommunications services more efficiently both Bell Atlantic and resellers have developed various systems to handle orders, billing, and repair requests on a wholesale basis. Through this mechanized wholesale process, Bell Atlantic avoids producing and mailing individual bills and resellers like CTC have direct access to a number of Bell Atlantic's systems so the reseller can do much of the work that Bell Atlantic would otherwise do.

bodies in each of the states in which it had encountered the change of policy[23]. Illustratively, the New York Commission concluded that:

> Bell Atlantic cannot collect a termination charge for a valid assignment from an end user to a reseller where, as here, the assignment does not terminate the contract. We find that Bell Atlantic cannot refuse to process any order from CTC that gives effect to a valid contractual rights assignment from a Bell Atlantic end user to CTC in which the essential terms of the original contract remain in effect....[24]

The New York Commission's decision also finds that the resale restrictions inherent in the Bell Atlantic policy change constitute violations of 47 U.S.C. §§ 251(b)(1) and 251(c)(4). The Order concludes that Bell Atlantic's activity is "discriminatory and designed to protect market position." However, the mere fact that the New York Commission had plainly ruled against it did not appear to have any effect on Bell Atlantic. Instead of complying with the Commission's Order, Bell Atlantic adopted a new set of forms and procedures the purpose and effect of which was to bring the assumption of contract arrangements to a complete halt. In effect, more than eight months after having sought relief from the New York Commission, and having been sustained by the Commission on each of its contentions, CTC is still not able to process contract assignments in New York or to provide resale service to Bell Atlantic customers who have sought it from CTC. Indeed, CTC has filed a motion with the New York Commission to compel Bell Atlantic to obey the Commission's Order.[25]

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[23] *I.e.* New York, Massachusetts, Rhode Island, Vermont, Maine and New Hampshire.

[24] NYPSC Order, at 6.

[25] Interestingly, although New York law provides that Commission orders are effective upon release, Bell Atlantic has never sought to stay or appeal the Order. Instead, for reasons best

Accordingly, while Bell Atlantic is representing to the general public that it is fully cooperative in respect to resale of local exchange service,[26] it is all too apparent that Bell Atlantic will concede no ground willingly and that state Commissions will have to resort to coercive or punitive powers to compel Bell Atlantic to obey a market-opening Order.[27]

CTC recognizes that the assumption of resale contracts is a relatively narrow issue in the context of the present matter. To CTC, however, it is the lifeblood of its business as a CLEC and this Commission, in ruling on the question whether the proposed merger is in the public interest, must be fully informed about the reality that exists in the ILEC/CLEC universe. More specifically the FCC must recognize that what really matters is not the carefully crafted policy statements of senior management but the day-to-day reality. For CTC that reality is that Bell Atlantic is consciously and as a matter of corporate policy, doing everything in its power to frustrate the development of CLEC resale competition.

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known to itself, it simply declined to implement the Commission's Order.

[26] *See, e.g.* a classic case of corporate doubletalk in an October 7,1997 speech of Raymond Smith to the American Enterprise Institute "Smoke Detection: Clearing The Air on Local Competition," claiming that Bell Atlantic is fully cooperative with public policy supporting the introduction of CLEC competition and that those who claim the contrary are using smoke and mirrors. In his speech Mr. Smith says, inter alia, that "We're living up to [our merger agreements with the FCC] by investing hundreds of millions of dollars in the systems and processes required to serve local competitors." see http://www.ba.com/Speeches/1997/Oct/1997 71007002.html. Given the facts found by the New York Public Service Commission in the resale controversy there appears to be a massive gap between Bell Atlantic's press releases and its day-to-day conduct of its business. If there is smoke and mirrors, they emanate from Bell Atlantic's headquarters.

[27] In New Hampshire, Bell Atlantic has indicated that it will comply with that Commission's Order, following the development of a new assignment form.

B. GTE

GTE currently offers only limited service within Bell Atlantic's service area. Nevertheless the proposed merger is also anticompetitive and contrary to the public interest because it will vastly increase the size and economic power of a company with a long history of resisting the market-opening measures now required by federal and state law in the local exchange market. Unlike the Bell companies -- which are at least subject to the restraint that they cannot enter the long-distance market until they have complied with the "competitive checklist" of Section 271 of the 1996 Act, 47 U.S.C. § 271(c)(2)(B) -- GTE is presently subject to no such restraint and, as a consequence, has felt little inhibition about engaging in delaying and obstructionist tactics to thwart implementation of federal and state market-opening requirements. Since the 1996 Act became law nearly three years ago, GTE's coordinated national strategy of delay and intransigence has stifled development of local competition. Indeed, GTE's tactics have served to close GTE's markets in many states to any substantial local competition, whether by resale or by use of unbundled network elements purchased from GTE. GTE's success in closing its markets to CLECs is starkly reflected in data it recently submitted to the FCC regarding its provisioning of resold lines and unbundled network elements to CLECs[28].

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[28] The success of GTE's tactics is well documented. In its response to the Second CCB Survey on the State of Local Competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - .02%; Ohio - .004%; Oregon -.03%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin -.06%. http://www.fcc.gov/ccb/local-competition/survey/responses. Of the total lines GTE provided other carriers, slightly under 1% were UNEs. *Id.*

If GTE is permitted to merge with Bell Atlantic, thereby more than doubling in size and power, its ability and incentive to thwart competitive entry will be heightened, to the detriment of competition and the consuming public. As shown below, GTE's strategy to frustrate competitive entry has been based upon two basic principles: GTE makes it as costly and burdensome as possible for CLECs to enter its territory, and then attempts to ensure that the terms and conditions under which CLECs can do business in its territory are as disadvantageous to CLECs as possible. The data set forth above attest eloquently to the success of this GTE strategy.

1. **The Negotiation Process:** All CLECs seeking to provide competitive local exchange services in GTE's service territory must begin with interconnection negotiations with GTE. While the 1996 Act sets out a swift negotiation schedule for achieving such agreements, GTE has perfected methods to make these negotiations difficult, protracted, and costly. GTE's negotiating position regularly ignores and conflicts with state arbitration rulings that have already been issued. As a result, each successive CLEC is forced to negotiate issues which have already been dispositively resolved at the state commission level, needlessly wasting the CLECs resources and detracting from any legitimate issues the parties may need to resolve within the 160 day negotiating period provided by Section 252 of the 1996 Act.

The comparable figures for Bell Atlantic, while also disturbingly low, are an order of magnitude higher than GTE's figures. The number of total local lines of Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines GTE provided other carriers, slightly under 12.3% were UNEs. *Id.*

Federal courts have uniformly rejected numerous premature GTE appeals of arbitration decisions[29]. These GTE appeals serve only to delay the unencumbered availability of interconnection agreements to other CLECs that wish to exercise their 47 U.S.C. § 252(i) rights, preventing competitors from entering the local exchange market.

GTE has also employed obfuscation tactics in various negotiations by changing its positions once negotiations are substantially under way or even after an arbitration proceeding has commenced. CLECs that have negotiated with GTE on a multi-state basis have discovered that after they have negotiated or arbitrated interconnection agreements with GTE for one state, GTE has insisted on starting negotiations in other states as though no prior negotiation had occurred, rather than carrying forward terms and conditions already agreed to by the parties in other states. In one instance, GTE went so far as to raise at arbitration new contract issues it had never articulated in 160 days of negotiations with a CLEC[30]. These practices are in dereliction of GTE's Section 251(c)(1) duty to negotiate in good faith. The effect of this conduct upon CLECs is to inject unnecessary costs and delays into the interconnection process. This in turn harms consumers by delaying local competition.

2. The Arbitration Process: Once an arbitration proceeds, GTE again places serious obstacles in the way of resolving differences with CLECs. Specifically, GTE insists upon numerous contract provisions that range from anticompetitive to patently frivolous.

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[29] Published decisions in eight such premature GTE appeals are cited in *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 1998 WL 413749 at *4 (W.D. Mich. July 21, 1998).

[30] *In the Matter of KMC Telecom Inc. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with GTE North Incorporated,* Cause No. 40832-INT-01 (Ind. U.R.C. Feb. 11, 1998).

At arbitration, GTE has asserted, over CLEC protest, that it needed contract provisions that would give it the ability to:

- Review CLEC publicity in advance when the CLEC's service is provided under the agreement; [31]
- Shift the costs of environmental compliance and clean up to CLECs without any showing that they created the environmental hazard; [32]
- Unilaterally terminate the interconnection agreement when GTE sells an exchange to another carrier, leaving the CLEC with no means of serving its customers;[33]

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[31] Verified Petition of US Xchange of Indiana, LLC For Arbitration of Interconnection Rates, Terms, and Conditions, *In the Matter of US Xchange of Indiana, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systemb of the South*, Cause No. 41034-INT-01, at 15-16 (Ind. Util. Reg. Comm'n Oct. 24, 1997) ("*USX Indiana Petition*").

[32] *In the Matter of US Xchange of Indiana, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of the South*, Cause No. 41034-INT-01, at 6-10 (Ind. Util. Reg. Comm'n Feb. 11, 1998) ("*USX Indiana Order*"); *BRE Communications, LLC Petition for Arbitration of Interconnection Terms, Conditions and Prices from GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of Michigan*, Case No. U-11551, at 24-26 (Mich. P.S.C. Dec. 14, 1997).

[33]Petition of GST Lightwave (WA), Inc. for Arbitration of Interconnection Rates, Terms and Conditions, *In the Matter of the Petition of GST Lightwave (WA), Inc. for Arbitration of an Interconnection Agreement Pursuant to 47 U.S.C. Section 252 with GTE Northwest, Inc.*, at 34-36 (Wash. Utils. & Trans. Comm'n Apr. 15, 1997).

- Place onerous restrictions on resale of retail services, substantially impairing a CLEC's ability to resell a complete range of retail GTE services;[34]
- Escape liability for the gross negligence of its employees.[35]

Time and again, GTE forces CLECs to litigate the same issues, sometimes more than once in a single state. GTE's actions erect barriers to competition that divert CLEC resources from serving customers to fighting regulatory battles with GTE. Moreover, even after it completes an arbitration, GTE somehow manages to avoid signing an interconnection agreement. In Ohio, GTE completed arbitrations with AT&T and Sprint nearly two years ago,[36] yet has no interconnection agreement with either.

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[34] Arbitration Award, *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated,* Case No. 96-1021-TP-ARB (PUCO Jan. 30, 1997) at 13; Order, *In the Matter of US Xchange of Indiana, LLC Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of the South*, Cause No. 41034-INT-01, at 5-6 (Ind. Util. Reg. Comm'n Feb. 11, 1998); Order, *Petition of AT&T Communications of Indiana, Inc. Requesting Arbitration of Interconnection Terms, Conditions and Prices from GTE North Incorporated and Contel of the South, Inc. d/b/a GTE Systems of Indiana, Inc.,* Cause No. 40571-INT-02, at 11-15 (Dec. 12, 1996).

[35] *USX Indiana Petition*, at 13-14.

[36] *In the Matter of the Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, Arbitration Award, December 24, 1996; *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated,* Case No. 96-1021-TP-ARB, Arbitration Award, January 30, 1997, at 13. The Ohio experience is not atypical. GTE arbitrated with AT&T in Indiana and Illinois at about the same time as its Ohio arbitration, yet has no filed agreement with AT&T in either of those states.

3. **The Adoption Process:**[37] Section 252(i) of the 1996 Act provides that CLECs may adopt other approved interconnection agreements. Adopting another interconnection agreement should be a wholly administrative task in which requisite filings are made to state commissions; no negotiation should be necessary. Both GTE and Bell Atlantic have, however, turned the exercise of Section 252(i) rights into a protracted process riddled with unnecessary negotiations and interminable administrative delays.

After receiving a formal request to opt into a specific agreement, both carriers return a draft opt-in document. Both carriers have insisted in this document that carriers that opt in must respect any subsequent modifications that the primary CLEC and the incumbent LEC ("ILEC") negotiate. This position does not withstand scrutiny. As an example, the initial CLEC could determine that it will pursue only a resale strategy and not purchase any unbundled elements, and modify its agreement by deleting provisions for purchase of unbundled elements in exchange for gains in other areas of the agreement. While this might benefit the primary CLEC, the secondary CLEC would be locked into an agreement that was desirable when it opted in, but has been changed by other parties and has become unsatisfactory. Clearly, ILECs are not entitled to renegotiate other carriers' contracts without their participation. Yet GTE and Bell Atlantic insist on negotiating this provision every time a carrier opts into the agreement.

Bell Atlantic has used the opt in process to attempt to exact concessions from CLECs regarding reciprocal compensation. For example, in September 1998, ChoiceOne Communications, a New York CLEC, asked to adopt one of Bell Atlantic's New York

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[37] For clarity, this section of CTC's Comments includes reference to Bell Atlantic as well as to GTE.

interconnection agreements. Bell Atlantic returned an adoption agreement that would have denied ChoiceOne reciprocal compensation for terminating traffic to Internet Service Providers, contrary both to the language of the primary interconnection agreement and to a controlling New York Public Service Commission decision on the subject. Bell Atlantic later relented, but only after ChoiceOne had to incur the expense of bringing the matter to the New York Commission's attention. Again, the CLEC lost time and resources disputing a matter already decided.

4. The Process of Establishing Rates Between GTE and CLECs: For CLECs to be able to compete effectively in GTE markets, they must be able to obtain critical services, such as unbundled loops, at reasonable, cost-based rates. Otherwise, their theoretical "right" to compete in GTE territory will remain just that: a "theoretical right." Unfortunately, GTE has erected substantial obstacles to a CLEC's ability to obtain reasonable rates for these critical services. A CLEC has a choice: it can pay the unreasonable rates advocated by GTE or it can engage in a costly and time-consuming struggle in a rate proceeding to establish the impropriety of GTE's proposals. Since enactment of the 1996 Act, GTE has consistently taken the position that it should be entitled to recover all of its historical costs from competitors through unbundled network element ("UNE") prices, notwithstanding the forward-looking cost standard contained in section 252(d) of the 1996 Act. Illustratively the Ohio PUC rejected GTE's position that its interconnection agreement with AT&T could not go into effect "until such time as the Commission has put into place a mechanism to provide GTE with the opportunity to recover its historic costs and (2) established a universal service system which is competitively neutral."[38] Similarly, GTE unsuccessfully argued before the Ohio Commission in its arbitration with Sprint that Sprint should be required to pay for GTE's "opportunity costs."[39]

Likewise, from Missouri to Hawaii to Indiana to Minnesota to North Carolina to New Mexico,[40] GTE has repeatedly argued that the 1996 Act has caused it harm, so that it is forced to sell access to its network elements at rates that are somehow less than compensatory. Of course, such claims are flatly inconsistent with the optimistic tone taken by GTE in its 1996 Annual Report, when its Chairman trumpeted passage of the 1996 Act as "a triple-win situation. It's good for the country. It's good for consumers. And it's *great* for GTE."[41]

The 1996 Act expressly prohibits the kind of stranded cost recovery that GTE has proposed in state after state. Section 252(d) of the 1996 Act specifically limits the costs that ILECs will be allowed to recover to those costs "determined without reference to a rate-of-return or other rate-based proceeding."[42] While the statute clearly disallows the stranded cost recovery that GTE repeatedly proposes, and no state commission to date has approved such a recovery

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[38] Opinion and Order, *In the Matter of the Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB (PUCO May 1, 1997) at Attachment, p.6.

[39] Arbitration Award, *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, terms, and Conditions and Related arrangements with GTE North Incorporated,* Case No. 96-1021-TP-ARB (PUCO Jan. 30, 1997) at 13.

[40] Case No. TO-97-124 (Mo. P.S.C.); Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-442, 407/M-96-939 (Minn. P.U.C.); Docket No. P-100, Sub133d (North Carolina U.C.); Docket No. 96-310-TC (N.M.S.C.C.).

[41] 1996 GTE Annual Report, Chairman's Message (emphasis in original).

[42] 47 U.S.C. § 252(d)(1)(A)(i) (1996).

mechanism in the telecommunications context, GTE continues to offer up this proposal in state after state in an effort to inflate its prices and foist historical costs onto competitors. Indeed, in addition to the Ohio Commission's above cited ruling in the AT&T and Sprint arbitrations, commissions in Missouri, Indiana, Minnesota, and New Mexico have already issued rulings stating that GTE's efforts to raise the costs that new entrants will pay to access its network and compete for customers are inconsistent with the 1996 Act[43].

To further burden CLECs seeking to enter GTE territory, in addition to its "stranded cost" recovery theory, GTE has also proposed in several states that competitors pay a so-called "interim universal service" surcharge directly to GTE[44]. Again, this surcharge has no relationship whatsoever to the pricing standards in the 1996 Act: GTE would have its competitors pay this extra amount to ensure that it does not lose any "support" when those competitors take certain customers off GTE's network. Nor does this proposed surcharge have any relation to universal service principles under the 1996 Act, as a mechanism that pays directly to the incumbent carrier

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[43] *Re Sprint Communications Company, L.P.*, Case No. TO-97-124, 176 P.U.R. 4th 285, 289 (Mo. P.S.C. Jan. 20, 1997); *In the Matter of the Commission Investigation and Generic Proceeding on GTE's Rates for Interconnection Services, Unbundled Elements, Transport and Termination Under the Telecommunications Act of 1996*, Cause No. 40618 (I.U.R.C. May 7, 1998); *AT&T Communications of the Midwest, Inc.*, Docket No. P-442, 407/M-96-939, 1997 WL 178602, at *12 (Minn. P.U.C. Mar. 14, 1997); *In the Matter of the Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC (N.M.S.C.C. July 15, 1998), at 50-52. Decisions in Hawaii and North Carolina are pending.

[44] Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.). Decisions on the proposed interim surcharge are pending in the Hawaii and North Carolina proceedings, while consideration of this issue has been transferred to a general universal service docket by the Indiana Commission. The New Mexico State Corporation Commission has rejected GTE's proposed interim universal service surcharge, noting that "double recovery of costs may result." *In the Matter of the Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC (N.M.S.C.C. July 15, 1998), at 52.

for alleged losses of implicit subsidies can hardly be considered equitable and nondiscriminatory[45]. In fact, even though the fundamental principle of universal service is to make telecommunications affordable for consumers,[46] GTE's proposed surcharges have been aimed solely at bolstering GTE's competitive position through the imposition of unwarranted financial burdens on competitive entrants.

There can be little doubt, based upon its prior conduct in permanent rate proceedings, that GTE will do everything in its power to impede CLECs' entry and add to their costs of entry. Although as noted herein, CTC has experienced significant anti-competitive conduct by Bell Atlantic, this Commission should be aware that GTE has demonstrated a penchant in other jurisdictions for even worse behavior. The worst possible result of the proposed merger would be for GTE's prior behavior to become characteristic of the merged entity. This Commission should know what sort of corporate citizen it will be acquiring if it approves this merger.

IV. THE MERGED ENTITY WILL REQUIRE FULL SECTION 271 AUTHORITY TO OFFER INTERLATA SERVICES.

Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 271, prohibits any Bell operating company (such as Bell Atlantic), including its subsidiaries and other affiliates, from providing interLATA services in any state within its region unless and until the Federal Communications Commission ("FCC") has determined, after the required consultation with the affected state commission(s), that the Bell operating company has met the requirements of § 271. Bell Atlantic has applied for § 271

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[45] *See* 47 U.S.C. § 254(b)(4) (1996).

[46] *Id.* at § 245(b)(1).

authority from the New York Commission to offer interLATA services in New York but has not yet received such permission and has not even requested such authority from other state commissions within its service area or from the FCC. Accordingly, should Bell Atlantic consummate the transaction for which it seeks Commission approval, Bell Atlantic will be in direct violation of § 271, and will have circumvented the required FCC § 271 approval process and negated the key role of various state commissions and of this Commission in deciding when and if Bell Atlantic will be allowed to provide interLATA services.

Applicants attempt to brush this fatal problem aside on page 19 of the Public Interest Statement. Implicitly acknowledging that the post-merger provision of interLATA services will violate § 271, Petitioners state that, if Bell Atlantic has not obtained § 271 approval by the time of closing, "the combined company will request any necessary transitional relief from the Commission." Applicants do not reveal to the Commission or to other interested parties what such "transitional relief" might consist of, and indeed they cannot -- since the FCC expressly does *not* have the power to forbear from applying the requirements of § 271. *See* 47 U.S.C. § 160(d). Additionally, Applicants mention only that they intend to obtain transitional relief from the FCC, without regard to the statutorily-mandated involvement of state Commissions in any decision to allow Bell Atlantic to provide interLATA services. *See* 47 U.S.C. § 271(d)(2)(B). The Commission should be vigilant to assure that creative back-hauling of traffic and clever marketing are not used to provide a possible work around of the check list limitations of § 271 of the Communications Act.

V. IF THE MERGER IS APPROVED, IT SHOULD BE SUBJECT TO PRE-MERGER STRINGENT MARKET-OPENING CONDITIONS.

If, notwithstanding all the foregoing, this merger is approved, the Commission should require premerger conditions to ensure that the merged company will truly open its markets to competitive entry, and swift and substantial sanctions to address any failure to comply with these market-opening conditions.

A. Conditions

Specifically, the Commission should address the following concerns in structuring conditions for merger approval:

1. **Resale Restrictions:** The Commission should require the new Bell Atlantic-GTE to commit to eliminate unreasonable restrictions on resale. For example, Bell Atlantic has repeatedly taken the position that whenever a customer under a contract service arrangement ("CSA") wants to switch the contracted service to a reseller, that switch of service is a termination of the CSA for which penalties will be assessed against the end user. *See* pp. 13-17, *supra*. This unreasonable restriction has no basis in law and serves only to deter end users from availing themselves of the competitive opportunities envisioned by the Act. Although three state commissions have ruled against Bell Atlantic on this point, it has simply refused to eliminate its numerous anticompetitive practices in respect to resale.

2. **Resale of Voicemail:** If the Commission approves the merger, it should require Bell Atlantic-GTE to make its voice messaging services ("VMS") available for resale at an avoided cost discount or, at the very least, the retail price for those services. Technical limitations and economic barriers prevent resellers from offering VMS in the same manner and at

the same level of quality that Bell Atlantic or GTE offers to their own customers. The inability to provide VMS places resellers at a competitive disadvantage, since they cannot offer an entire segment of the ILEC's customer base a service that they have come to expect from their telephone company. Requiring Bell Atlantic-GTE to provide VMS for resale would eliminate the tying arrangement between local exchange service and VMS, thereby providing resellers with the opportunity to compete for each and every customer in Bell Atlantic-GTE'S customer base.

3. **Interim Number Portability:** Despite the fact that this Commission has ruled that interim number portability ("INP") costs should be recovered from competitors in a competitively neutral manner,[47] GTE has proposed in state after state that it should be permitted to recover the full incremental cost of providing INP from its competitors.[48] The Commission specifically rejected such a proposal in its *Number Portability Order* and instead set forth a number of alternative mechanisms for states to consider in deciding how INP costs should be recovered. Rather than forcing competitors fight this issue time and again with GTE, the Commission should compel the new Bell Atlantic-GTE, as a condition of merger approval, to establish a competitively neutral INP cost recovery mechanism (consistent with those set forth in the *Number Portability Order*) for every jurisdiction in which it operates as an ILEC.

4. **Availability of Arbitrated Rates:** In a number of states, GTE is declining to make available to other carriers those UNE prices and resold discounts that are the

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[47]*Telephone Number Portability*, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("*Number Portability Order*").

[48]Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

product of its arbitrations with AT&T. Because AT&T and GTE have not executed final interconnection agreements in many states, GTE prevents other CLECs from purchasing UNEs and resold services from GTE at the arbitrated rates. In essence, GTE would require each CLEC to relitigate the same cost studies to obtain these rates. Quite simply, this is a barrier to entry that GTE has erected out of legal fiction. Requiring GTE to make its arbitrated rates available to all competitors will dramatically reduce the legal costs associated with competitive entry and spare state commissions the administrative burden of repetitive arbitration proceedings.

5. Special Construction Charges: CLECs seeking to collocate in Bell Atlantic central offices that lack developed space have been confronted with massive special construction charges. In order to alleviate the barrier to entry that special construction charges represent, the Commission should establish a procedure by which the first collocator in a central office requiring special construction pays its pro rata share of the charges. Bell Atlantic then amortizes and recovers the remaining charges from all other CLECs operating within the same area.

The Commission should revisit its policy on special construction and require that, as a condition of the merger, the new Bell Atlantic-GTE must refrain from assessing special construction charges against CLECs when it would not assess such charges to its own retail customers. The Commission's position in this regard is strengthened by the fact that special construction charges would not exist in a forward-looking network. Rather, the need for special construction is an attribute of the incumbent's embedded network design.

6. Winback Programs: The Commission should issue a clear directive regarding the use of winback programs by Bell Atlantic-GTE, and the sharing of information between its retail and wholesale operations. To stop this anticompetitive, backdoor sharing of information, the Commission should establish that the ILEC's winning back of a customer prior to switching over to the competitor's retail service is *prima facie* evidence of a violation of § 251 of the 1996 Act. Moreover, to ensure that Bell Atlantic-GTE's incentives to engage in such conduct are minimized, the Commission might consider establishing a window of time – perhaps 60 days – during which the merged entity would be prohibited from contacting any customer that has switched to a competitor's service.

7. **Internet Bundling**: Apart from local exchange, long distance, and related telecom services, there is yet another respect in which this Commission must act to protect the provision of access to the Internet. GTE is the fourth largest ISP in the U.S. Recently GTE purchased BBN, one of the pioneer Internet companies and creator of the government's packet-switched Internet backbone. With this purchase, GTE not only acquired years of experience, but also a national backbone that has enormous capacity. Bell Atlantic has publicly stated that it will focus on bundling telephone and Internet products to meet customer needs. The Commission should assure that any such bundling is not implemented in a way which inhibits competition within the state. For example, the Commission should assure that GTE's new DSL service offering and any similar service offerings Bell Atlantic may propose for dedicated access to ISPs are freely available for CLECs to resell.[49] This can be achieved by requiring that DSL be tariffed for interstate service and be available for resale.

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[49] *See GTE Telephone Operating Companies GTOC Tariff No. 1*, CC Docket No. 98-79, FCC 98-292, *rel.* Oct. 30, 1998. Any such offerings should include as well such UNEs as are necessary to provision the DSL service.

With respect to all these conditions it is imperative that they be imposed as conditions precedent to merger, rather than as future commitments. Unscrambling an effectuated merger is virtually impossible so this Commission's leverage will never be higher than prior to the grant of authority to merge. Moreover the Commission must establish financial penalties for non-performance and, in the event of a dispute, assign the burden of proof to the merged entity. These penalties should be set in a sufficient amount so that they are taken seriously by the merged entity[50].

VI. CONCLUSION

Bell Atlantic and GTE seek the Commission's approval for a merger allegedly intended to enable them to compete more effectively. No convincing showing has been made that either applicant requires additional geographic scope, financial, technical, or any other kind of enhanced resources to compete effectively. The main thrust of their Public Interest Statement is that the merger will create an entity of sufficient scope and scale to compete with the nation's and indeed the world's largest telecommunications entities. Even if it were true that individually GTE and Bell Atlantic are not large enough for such competition – which has not been shown –it ignores the vital interests of the less grandiose commercial entities, not to speak of residential subscribers, whose interests were intended to be advanced by the 1996 Act. Before the

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[50] A penalty, for example, of $1,000 per day for not meeting a provisioning deadline would constitute such a minuscule pinprick for a company with combined annual revenues of $53 billion that it would serve little purpose. CTC suggests that penalties for unreasonable delays or failures to keep commitments begin at $10,000 per incident, with each additional day being considered a separate offense. See § 503(b)(2)(B) of 47 U.S.C. providing a forfeiture not to exceed $100,000 for each instance in which a common carrier knowingly fails or neglects to obey or comply with the Act, a condition of its authorization, or a Commission order.

Commission rules on the merits of this contention, it should ensure that Bell Atlantic has opened its territories irrevocably to competition. In light of GTE's abysmal anticompetitive record to date, this Commission should proceed in a very careful and deliberate fashion to assure that GTE's enhanced presence in Bell Atlantic's service area is consistent with the public interest in the prompt and good faith fulfillment of market-opening measures. The suggested premerger conditions are absolutely necessary to foster the development of facilities-based CLECs that will have the ability to compete effectively with a combined Bell Atlantic/GTE entity.

WHEREFORE, CTC respectfully requests the Commission to:

a) deny the application as contrary to the public interest; or

b) institute an investigation into the proposed merger; and

c) grant such further and other relief to CTC as may be appropriate upon consideration of the full evidentiary record developed at hearings.

By: ______________________

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November 23, 1998

STATEMENT

My name is Jordan Michael. I am Director, Regulatory Affairs of CTC Communications Corp. I have reviewed the foregoing Comments of CTC Communications Corp. concerning the applications of Bell Atlantic Corporation and GTE Corporation for approval to merge GTE into Bell Atlantic.

I declare, under penalty of perjury, that all of the factual matters concerning CTC and its difficulties securing the right to resell Bell Atlantic service set forth therein are true and correct to the best of my knowledge and belief.

November 23, 1998

Jordan Michael

Jordan Michael

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 23rd day of November 1998, I served a copy of the *Comments of CTC Communications Corp., CC Docket No. 98-184,* on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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